

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

AYA Plumbing, Inc.

**Case Nos. 13-0574-PWH and
13-0576-PWH**

From Civil Wage and Penalty Assessments issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

The Requests for Review. These consolidated cases involved the Mead Valley Community Center public works project (Project) for the Redevelopment Agency of the County of Riverside. The prime contractor, AWI Builders, Inc. (AWI) requested review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) which had determined that workers employed on the Project were due \$69,903.68 in unpaid prevailing wages and an additional \$6,900.00 in statutory penalties under Labor Code section 1775¹ (DLSE case no. 40-34702-143). AWI's request for review was assigned case no. 13-0573-PWH. AWI's plumbing subcontractor, AYA Plumbing, Inc. (AYA) separately requested review of the Assessment. AYA's request for review was assigned case no. 13-0574-PWH.

DLSE issued a separate Determination of Civil Penalty (Determination) arising out of the work done on the project by AWI and AYA, determining the AWI and AYA had failed to obtain and employ apprentices under section 1777.5, resulting in the levy of penalties amounting to \$15,920.00 under section 1777.7 (DLSE case no. 44-36310-143). AWI's request for review of the Determination was denominated case no. 13-0575-PWH. AYA's separate request for review of the Determination was denominated case no. 13-0576-PWH.

¹ All further statutory references to code sections are to the California Labor Code.

Settlement with the Prime Contractor. AWI eventually agreed to settle with DLSE. In light of the settlement, AWI withdrew its requests for review from both the Assessment and the Determination. Case numbers 13-0573-PWH and 13-0575-PWH were dismissed. DLSE informed the Hearing Officer that case numbers 13-0574-PWH and 13-0576-PWH survived the settlement by AWI, and requested that a Hearing on the Merits be set to adjudicate AYA's liability for the penalties assessed under the Assessment and by the Determination.

Pursuant to written notice, a Hearing on the Merits was scheduled for February 9, 2016, in Los Angeles, California, before Hearing Officer John J. Korbol. Theresa Bichsel appeared for DLSE. There was no appearance for AYA. Now, based on unrebutted evidence showing that AYA failed to pay workers the required prevailing wage and failed to obtain or employ the required number of apprentices, the Director affirms the Assessment and the Determination as amended.

FACTS

Failure to Appear. At the initial Prehearing Conference on August 11, 2014, Mr. Movses Anserlian of AYA was contacted by the telephone number provided by AYA and participated in the Conference. For Prehearing Conferences on July 13, 2015, and August 31, 2015, the Hearing Officer called the telephone number for AYA and was invited to leave a voicemail message, which he did. A final Prehearing Conference was held on November 9, 2015, and again there was nobody to answer when the Hearing Officer dialed AYA's telephone number. On each occasion, a notice of the Prehearing Conference had been mailed to AYA at its last known address. A notice of the Hearing on the Merits was provided to AYA at its address of record on November 16, 2015. None of the notices mailed to AYA by the Hearing Officer were returned by the U.S. Postal Service as undeliverable or with a forwarding address.

At the final Prehearing Conference, case nos. 13-0574-PWH and 13-0576-PWH were consolidated for purposes of conducting a Hearing on the Merits. DLSE served a witness list, an exhibit list, and a proposed joint statement of issues on AYA prior to the Hearing on the Merits as ordered by the Hearing Officer. AYA submitted no witness list or list of exhibits and did not respond to DLSE's proposed joint statement of issues.

AYA did not appear at the Hearing on the Merits. Pursuant to notice, the Hearing Officer proceeded to conduct the Hearing on the Merits on February 9, 2016, for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection and the matter was submitted on the exhibits and the oral testimony of DLSE's Deputy Labor Commissioner, Maria Sandoval.²

The Assessment and the Amended Penalty Determination. Before the Hearing was opened, DLSE notified the Hearing Officer that the 1777.5 Assessment had been amended to reduce the penalties from \$15,920.00 to \$12,320.00. This amendment was necessary after the AWI settlement, and the reduction reflects the section 1777.7 penalties that had been attributed to the alleged failure to employ apprentices by AWI.

The facts stated below are based on DLSE Exhibits 1 through 30 admitted into the evidentiary record, including the Assessment, the Penalty Determination, and other documents in the Hearing Officer's file.

On June 21, 2011, AWI entered into a public works contract with the Redevelopment Agency for the County of Riverside regarding the Project. Although AWI's subcontract with AYA is not in the record, AYA's status as a plumbing subcontractor to AWI is evidenced by the certified payroll records obtained from AYA. The applicable wage determination is RIV-2011-1 (General Prevailing Wage Determination for Riverside County) and the applicable classifications are: Plumber, Industrial and General Pipefitter; Sewer and Storm Drain Pipelayer; and Sheet Metal Worker.

According to the Assessment, AYA failed to pay the required prevailing wages to two of its workers employed on the Project. The wage underpayments, in the aggregate amount of \$69,903.08, resulted from the underreporting of the actual hours worked. In addition, DLSE

² Some of DLSE's exhibits could not be admitted into evidence during the Hearing because they had not been redacted to eliminate the personal identifying information of the workers named therein. DLSE was granted leave to redact those exhibits. The redacted exhibits were then submitted to the Hearing Officer with a written motion renewing DLSE's request to have the redacted exhibits admitted into the evidentiary record. That motion is hereby GRANTED, and DLSE exhibits 8, 10, 12, 13, 13B, 14, and 14B are hereby admitted.

assessed \$6,900.00 in penalties under section 1775 at the mitigated rate of \$30.00 per day for 230 instances of failure to pay the applicable prevailing wages.³

According to the Determination, AYA failed to employ registered apprentices on the Project and failed to timely request the dispatch of apprentices from the relevant apprenticeship committees in the geographic area of the project site. DLSE imposed a penalty of \$15,920.00 for violating the apprenticeship requirements of section 1777.5. With a credit from AWI's payment of \$3,600.00 toward these penalties, AYA's potential liability for the 1777.7 penalties was reduced to \$12,320.00. This figure represents a mitigated penalty rate of \$40.00 per day for AYA's 398 days of work on the Project without apprentices.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a); see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

The Assessment. Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. During the relevant period, the penalty under section 1775 was a maximum of \$50.00 for each calendar day for each worker paid less than the prevailing wage.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review shall be conducted and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing.

³ As previously noted, AWI settled that portion of the Assessment involving unpaid prevailing wages and attendant liquidated damages.

At the hearing the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).) In this case, the record establishes the bases for the 1777.5 Assessment and AYA’s liability therefor. This includes penalties at the rate of \$30.00 per violation for 230 instances of failure to pay the applicable prevailing wage. AYA presented no evidence to disprove those bases, nor has AYA shown that DLSE’s determination on the amount of section 1775 penalties constituted an abuse of discretion. Accordingly, the Assessment is affirmed. Because DLSE voluntarily settled the issues other than penalties with AWI, there is no need for a finding as to AYA’s liability for unpaid prevailing wages.

The Determination. Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case).

Section 1775.5, subdivision (e) requires that, prior to commencing work on a public works project, every contractor shall submit contract award information to an apprenticeship program that can supply apprentices to the site of the public work. The implementing regulation states, in pertinent part:

(a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract . . . for the purpose of determining the accrual of penalties under Labor Code Section 1777.7. (Cal. Code Regs., tit. 8, §230, subd. (a).)

As to the penalty for non-compliance, if a contractor “knowingly violated Section 1777.5” a civil penalty is imposed under Labor Code section 1777.7 in an amount not exceeding \$100.00 per day for noncompliance. Here, DLSE assessed a penalty against AYA for its failure to comply with sections 1777.5, et seq. at the rate of \$40.00 per day for 398 days, the duration of AYA’s work on the Project.⁴

Under the former version of section 1777.7 that applies to this case,⁵ upon the contractor’s request for review of the penalty, the Director decides the appropriate amount of the daily penalty de novo. In this case, the record establishes the bases for the 1777.7 Determination and AYA’s liability therefor. The evidentiary record establishes that AYA did not hire any apprentices on the Project, nor did it attempt to obtain apprentices by circulating a DAS 140 to three apprenticeship committees for sheet metal workers in the area. As to apprentice plumbers, AYA submitted a DAS 140 to only one of eight apprenticeship committees in the geographic area. AYA presented no evidence to disprove those bases, nor has AYA shown that DLSE’s determination on the dollar amount of the section 1777.7 penalties (\$40.00 per violation rather than the maximum rate of \$100.00 per violation) is disproportionate to the severity of the violation. (§ 1777.7, subd. (a).) Accordingly, the 1777.7 Determination, as amended, is affirmed.

FINDINGS AND ORDER

1. Affected subcontractor AYA Plumbing, Inc. filed a timely Request for Review from the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement in case number 13-0574-PWH.
2. Affected subcontractor AYA Plumbing, Inc. filed a timely Request for Review from the Determination of Civil Penalty issued by the Division of Labor Standards Enforcement in case number 13-0576-PWH.
3. Affected prime contractor AWI Builders, Inc. settled the issues of unpaid wages and liquidated damages before the Hearing. AWI Builders, Inc. also paid \$3,600.00 in partial payment of the section 1777.7 penalties before the Hearing.

⁴ This dollar figure is reduced by \$3,600.00 in the amended Determination; this dollar amount represents part of AWI’s settlement payment that DLSE credited toward the section 1777.7 penalties.

4. Penalties under section 1775 are due from the affected subcontractor AYA Plumbing, Inc. in the amount of \$6,900.00 for 230 violations at the mitigated rate of \$30.00 per violation.

5. Affected subcontractor AYA Plumbing, Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contract award information in a DAS Form 140 or its equivalent to all applicable apprenticeship committees for the apprenticeable crafts of plumber and sheet metal worker in the geographic area of the Project site.

6. Affected contractor AYA Plumbing, Inc. violated section 1777.5 and California Code of Regulations, title 8, section 230.1 by failing to employ registered apprentices in the craft of plumber and sheet metal worker in the ratio of one hour of apprentice work for every five hours of journeyman work on the Project.

7. Under section 1777.7, penalties are assessed upon affected subcontractor AYA Plumbing, Inc. in the amount of \$12,320.00, computed at \$40.00 per day for the 398 days commencing on December 19, 2011 and ending on February 27, 2013, less credit for \$3,600.00 previously paid by the affected prime contractor, AWI Builders, Inc.

8. The amounts found remaining due from the Civil Wage and Penalty Assessment and the Determination of Civil Penalty, as amended, and affirmed by this Decision, are as follows:


Penalties under section 1775, subdivision (a):	\$ 6,900.00
Penalties under section 1777.7:	\$12,320.00
TOTAL	\$19,220.00

The Civil Wage and Penalty Assessment in case number 13-0574-PWH is affirmed in full as set forth in the above Findings. The Determination of Civil Penalty as amended, in case

⁵ Section 1777.7 was amended effective January 1, 2015. The previous version of section 1777.7 applies because the bid date for the Project was in 2011.

number 13-0576-PWH is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 7/29/2014


Christine Baker
Director of Industrial Relations